

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
I. Tomassi Jewelers, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ended 7/31/79. :
: .

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of October 20, 1983, 1984, he served the within notice of by certified mail upon I. Tomassi Jewelers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

I. Tomassi Jewelers, Inc.
35 Pine St.
Binghamton, NY 13901

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of October 20, 1983, 1984.

David Parchuck

James A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
I. Tomassi Jewelers, Inc. :
for Redetermination of a Deficiency or Revision :
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Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ended 7/31/79. :
:

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of October 20, 1983, 1984, he served the within notice of by certified mail upon Kenneth R. Parker, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth R. Parker
1599 New Scotland Rd.
Slingerlands, NY 12159

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
31st day of October 20, 1983, 1984.

David Parchuck

James P. Haggard

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 31, 1984

I. Tomassi Jewelers, Inc.
35 Pine St.
Binghamton, NY 13901

Gentlemen:

Please take notice of the of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Kenneth R. Parker
1599 New Scotland Rd.
Slingerlands, NY 12159
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
I. TOMASSI JEWELERS, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal Year	:	
Ended July 31, 1979.	:	

Petitioner, I. Tomassi Jewelers, Inc., 35 Pine Street, Binghamton, New York 13901, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended July 31, 1979 (File No. 33384).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on October 20, 1983, at 10:45 A.M., with all briefs to be submitted by March 6, 1984. Petitioner appeared by Kenneth R. Parker, C.P.A. The Audit Division appeared by John P. Dugan, Esq., (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division's denial of deductibility of certain items asserted by petitioner as compensation paid to an officer-shareholder, and reclassification of such items as non-deductible constructive dividends, was proper.

FINDINGS OF FACT

1. On March 12, 1981, following a field audit, the Audit Division issued to petitioner, I. Tomassi Jewelers, Inc., a Notice of Deficiency asserting additional corporation franchise tax due for the fiscal year ended July 31,

1979 in the amount of \$990.26, plus interest. This asserted deficiency is based upon the premise that certain deductions taken by petitioner, and subsequently disallowed on audit as being in the nature of personal expenses incurred by an officer-shareholder of petitioner, constituted a non-deductible constructive dividend and not compensation paid by petitioner to the officer-shareholder.

2. Petitioner operates a small retail jewelry store located in Binghamton, New York. The Audit Division conducted a field audit of the books and records of petitioner and of Edwin A. Tomassi, as an officer-shareholder of petitioner, the result of which was that a portion of certain specific expenses claimed by the corporation as deductible expenses were disallowed as being personal expenses of Edwin Tomassi paid on his behalf by petitioner.¹ The Audit Division recalculated Mr. Tomassi's personal income tax liability by including the disallowed items (except for contributions and building depreciation) as additional taxable dividend income to Mr. Tomassi. In turn, the Audit Division recalculated petitioner's corporation franchise tax liability by re-including the noted items in petitioner's tax base, denying deductability therefore upon the premise that such items (as paid) represented constructive dividends to Mr. Tomassi rather than additional compensation paid to him for services rendered.

3. The Audit Division deemed the disallowed items to represent a constructive dividend and not additional compensation on the basis that the bulk of the items were originally recorded on petitioner's books as "draw" (a drawing or withdrawals account to Mr. Tomassi) and were only later reclassified as expense items to the petitioner when the books were submitted to petitioner's accountant

¹ The specific items involved included claimed expenses for promotion, building repair, contributions, dues, building depreciation, automobile depreciation, automobile insurance and automobile gasoline.

for closing and preparation of tax returns. It was further noted that Mr. Tomassi was paid a fixed weekly salary by petitioner during the period at issue.

4. Petitioner's position is that the items disallowed as business expenses and deemed additional income to Mr. Tomassi, should be deemed additional compensation and not dividend income to Mr. Tomassi and hence should be allowed as a deduction to the petitioner. Petitioner asserts, in this regard, that although originally labelled as a draw, these amounts really represented anticipated business expenses of petitioner.

5. As the result of a pre-hearing conference, at which certain adjustments were allowed increasing the portion of the disputed items deemed properly deductible by petitioner, the deficiency as originally asserted (\$990.26) has been reduced to \$720.77.

6. Mr. Tomassi did not appear and give testimony as to the nature of the particular items in question nor was any source documentation or other evidence regarding the specific expenditures giving rise to these items presented.

CONCLUSIONS OF LAW

A. That petitioner asserts the amounts at issue are properly deductible as compensation and do not constitute constructive dividends. Section 162 of the Internal Revenue Code permits a deduction for ordinary and necessary business expenses, specifically including "a reasonable allowance for salaries or other compensation for personal services actually rendered". That "...[t]he test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments for services." (Treas. Reg. sec. 1.162-7).

B. That petitioner has failed to provide either documentary evidence or testimony pertaining to the contested items at issue and the nature and circum-


stances under which these expenditures were made. Accordingly, petitioner has failed to prove that such items were properly deductible as compensation and were not constructive dividends.

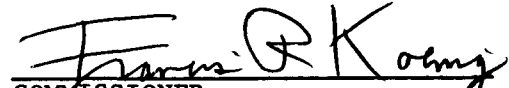
C. That the petition of I. Tomassi Jewelers, Inc. is hereby denied and the Notice of Deficiency dated March 12, 1981, as reduced as the result of the pre-hearing conference (see Finding of Fact "5") is sustained.

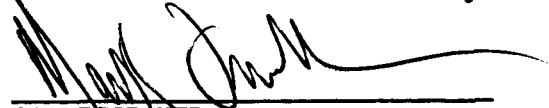
DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER